SUPREME COURT, U. S.

FILED

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NO. 955

IN THE

Supreme Court of the United States

October Term, 1966

YOUNG & COMPANY OF HOUSTON, *Petitioner*

-VERSUS-

ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals,
Third Supreme Judicial District of Texas, at Austin

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ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI
To The Court of Civil Appeals,
Third Supreme Judicial District of Texas, at Austin

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner Young & Company of Houston respectfully prays that a writ of certiorari issue to review the judgment of the Court of Civil Appeals for the Third Supreme

Judicial District of Texas, at Austin, entered in the above cause on June 22, 1966.

OPINIONS BELOW

The Opinion of the Court of Civil Appeals (Phillips, Associate Justice) is reported at 405 S.W.2d 174. It is printed in the Appendix.

The petitioner's Application for Writ of Error was REFUSED by the Supreme Court of Texas on October 12, 1966, without opinion.

JURISDICTION

The original judgment of the Court of Civil Appeals was entered on June 22, 1966. Motion for rehearing was denied on July 13, 1966.

Petitioner's Application for Writ of Error to the Supreme Court of Texas was by that Court REFUSED on October 12, 1966, by order of that date.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED FOR REVIEW

A company is engaged exclusively in the business of a contracting stevedore for ocean-going vessels transporting goods in foreign commerce, i.e., the company's employees load and unload the cargoes which the ocean-going vessels transport by sea between the United States and foreign countries. To carry on its business the company must furnish to its manual-labor employees machines and equipment. The company leases such machines and equipment so used in its stevedoring business, and the Texas taxing

authority requires the company to pay the Texas Use tax on the sums paid for the rental or lease of these machines and equipment.

Is such State use tax a tax on foreign commerce the power to levy which is reserved to the Congress by the Commerce Clause of the United States Constitution (Article I, Section 8, Clause 3)?

Is such State use tax an "Impost" or "Duty" on Imports or Exports the levy of which is forbidden to the State by the Export-Import Clause of the United States Constitution (Article 5, Section 10, Clause 2), when levied as here without the consent of the Congress?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution

Article I, Section 8, Clause 3:

> "The Congress shall have power . . . to regulate Commerce with foreign Nations, . . ."

Article I, Section 10, Clause 2:

> "No State shall, without the consent of the Congress, levy any Imposts or Duties on Imports or Exports . . ."

Statutes of the State of Texas

(Vernon's Annotated Revised Civil Statutes of the State of Texas, Volume 20A, Taxation-General)

Chapter 20—"*Limited Sales, Excise and Use Tax*"

"Art. 20.01—*Title—Definitions*

"This Chapter is known and may be cited as the 'Limited Sales, Excise and Use Tax Act,' and the fol-

lowing words shall have the following meanings unless a different meaning clearly appears from the context:

. . . .

"Art. 20.02—*Imposition of Limited Sales Tax*"

. . .

"Art. 20.021—*Method of Collection; Bracket System*

"(A) Every retailer shall add the sales tax imposed by Article 20.02 of this Chapter to his sale price and when added the tax shall constitute a part of the price, . . .

"Art. 20.03—*Imposition and Rate of Use Tax*

"An excise tax is hereby imposed on the storage, use or other consumption in this State of tangible personal property purchased, leased or rented . . . for storage, use or other consumption . . .

(A) *Liability for Use tax:* Extinguishment of Liability. Every person storing, using or otherwise consuming in this State tangible personal property purchased from a retailer or leased or rented from another person for such purpose is liable for the tax. His liability is not extinguished until the tax has been paid to this State . . ."

STATEMENT OF THE CASE

Petitioner at all pertinent times is and was a domestic corporation engaged exclusively in the business of loading and unloading ocean-going vessels, that is to say the company acts as the stevedore of vessels which carry cargoes by sea between the United States and foreign countries. It made contracts with the owners and operators of such vessels to load and unload these vessels in the Port of Houston, Harris County, Texas. Bedell dep., pp. 4-7, 22. The actual loading and unloading was done by manual laborers (long-

shoremen) employed by the company, and to perform their work the longshoremen used machines and equipment. The use of such machines was essential to the performance of the stevedoring operations. Bedell dep., pp. 11-13.

All of these machines and equipment so used were leased, and the lease rentals cost was figured into the rates charged the operators and owners of the ships. Bedell dep., pp. 12, 21.

Petitioner did not pay to its lessors the percentage of such lease rental amounts required to be paid to comply with the provisions of the Texas Limited Sales, Excise and Use Tax, in the belief that no tax was owing because petitioner was engaged in foreign commerce and the tax in its case would be a state tax on foreign commerce. The respondent Comptroller of the State of Texas disagreed, and he made a tax deficiency assessment accordingly. The tax so determined by the respondent was paid by petitioner under protest, and after the respondent refused refund suit was filed in accordance with law to recover these amounts as unlawfully assessed and collected. Tr., 3-6.

The deposition of the witness Bedell was taken, and the parties entered into the following stipulation:

> "The machines and pallets, the lease rentals of which are here taxed, were leased to plaintiff to be used exclusively in the loading and unloading of the cargoes transported aboard ocean-going vessels engaged exclusively in foreign commerce, and were so used, and such cargoes could not reasonably in accordance with present usages and practices of transporting such cargoes have been transported in foreign commerce without the use of such machines." Tr. 20.

Respondent then moved for summary judgment. Each party submitted briefs, petitioner's contending the tax unconstitutional as applied to its operations. Without opinion the trial court granted respondent's motion and entered judgment for respondent. Tr., 28-30.

This judgment was affirmed by the Court of Civil Appeals. Its complete opinion is printed in the Appendix.

Petitioner's contention that the tax had been imposed upon it contrary to the immunity from such taxation granted by the United States Constitution was plainly put to the Court of Civil Appeals, which rejected such contentions. That the issue before that Court was the unconstitutionality of the tax in its application to petitioner is shown by the following excerpt from the opinion of the Court of Civil Appeals:

> "Appellant is before this Court on a single point of error, being that of the trial court in holding the tax lawful on the machines and equipment the lease cost of which is here taxed were used by the stevedore as a necessary adjunct to carrying on its business, a business which is an integral part of foreign commerce. The sales and use tax here imposed is therefore an impost upon foreign commerce and its imposition is unlawful because (a) an exercise by a State of a power granted exclusively to the Congress of the United States by the Commerce Clause of the Constitution of the United States and (b) an impost or duty on imports and exports also forbidden to the States by the Constitution. Since the Texas Statute recognizes and exempts from taxation subjects which are prohibited to it by the Constitution of the United States, the tax is unlawful under the Texas Statute also.
>
> "We overrule this point."
>
> . . .

In accordance with the Texas statutes and Rules of Civil Procedure appeal was taken to the Supreme Court of Texas by timely filing of a motion for rehearing and after denial of such motion by the Court of Civil Appeals by timely filing of an Application for Writ of Error with the Supreme Court. R.C.S. Texas Articles 1728, 1729; Texas Rules of Civil Procedure, Rules 468, 469(c).

The Supreme Court Refused this Application, and the judgment of the Court of Appeals thus became final. Texas Rules of Civil Procedure, Rule 483.

REASONS FOR GRANTING THE WRIT

The State Court has decided a federal question of substance not heretofore precisely determined by this Court, in a way probably in conflict with applicable decisions of this Court: The United States Constitution forbids direct taxation of foreign commerce by the States, and stevedoring operations are an integral part of foreign commerce. The parties have here stipulated that the instrumentalities here on account of the use of which the tax is imposed are essential to the performance of the stevedoring operations and hence are themselves an integral part of foreign commerce.

The Use tax is here a direct imposition upon these instrumentalities and therefore unconstitutional in its application to stevedoring operations.

That stevedoring operations, the loading and unloading of ships transporting by sea cargoes between the United States and foreign countries, are part and parcel of foreign commerce has been settled by decisions of this Court.

Joseph v. Carter & Weekes Stevedoring Co., 330 U.S. 422, 67 S.Ct. 815 (1947), and *Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington*, 302 U.S. 90, 58 S.Ct. 72 (1937).

In the Puget Sound Stevedoring Co. case a tax levied upon the gross receipts of a stevedoring concern was stricken down, as a direct tax on an integral part of foreign commerce. In the instant case there is uncontested evidence that the use tax here would be a direct cost of the petitioner's stevedoring operations, and hence it is a direct tax on the foreign commerce, certainly as direct as and possibly even more direct than was the gross receipts tax in the Puget Sound Stevedoring Co. case.

In *Richfield Oil Corporation v. State Board of Equalization*, 329 U.S. 69, 67 S.Ct. 156 (1946), it is held that a direct tax on exports cannot be excused upon the plea it is a tax on the "preliminaries" of the exportation, where the State contended its sales tax was not on the goods but was on a "transaction" prior to exportation of the goods which were to be shipped abroad. After holding that while the States had some limited power to tax under the Interstate and Foreign Commerce Clause of the Constitution, the application of the sales tax imposed prior to export was rejected, on the ground that by virtue of the Import-Export Clause the States had no power at all to tax imports and exports and the tax was in reality one on exports: It was then made clear that *taxes imposed on instrumentalities necessary to the carrying on of foreign commerce were as unlawful as if imposed on the goods themselves*, it being said,

> ". . . Thus a federal stamp tax on a foreign bill of lading is a tax on exports, since, it is equivalent of a

direct tax on the articles included in the bill of lading. Fairbank v. United States, 181 U.S. 283, 21 S.Ct. 648, 45 L.Ed. 862. The same is true of federal stamp taxes on charter parties made excusively for the carriage of cargo in foreign commerce, United States v. Hvoslef, 237 U.S. 1, 17, 35 S.Ct. 459, 464, 59 L.Ed. 813, Ann. Cas. 1916A, 286, for a tax on those charter parties is 'in substance a tax on the exportation; and a tax on the exportation is a tax on the exports.' The same is likewise true of federal stamp taxes on policies insuring exports against maritime risks. Thames & Mersey Marine Ins. Co. v. United States, 237 U.S. 19, 35 S.Ct. 496, 59 L.Ed. 821, Ann. Cas. 1915D, 1087. The Court stated, 237 U.S. at page 27, 35 S.Ct. at page 499, 59 L.Ed. 821, Ann. Cas. 1915D, 1087:

" 'The rise in rates for insurance as immediately affects exporting as an increase in freight rates, and the taxation of policies insuring cargoes during their transit to foreign ports is as much a burden on exporting as if it were laid on the charter parties, the bills of lading, or the goods themselves. Such taxation does not deal with preliminaries, or with distinct or separable subjects; the tax falls upon the exporting process.' " (329 U.S. 80, 67 S.Ct. 162)

While on the facts it was decided that the goods had not yet entered the stream of foreign commerce and were still part of the mass of property within the state and hence subject to the property tax, in *Empresa Siderurgica v. County of Merced*, 337 U.S. 154, 156, 69 S.Ct. 995, 997 (1949), it is held:

". . . The tax immunity runs to the process of exportation and the transactions and documents embraced in it. . ."

Like holdings are made in *A. G. Spalding & Bros. v. Edwards*, 262 U.S. 66, 43 S.Ct. 485 (1923), and *Crew Levick Co. v. Commonwealth*, 245 U.S. 292, 38 S.Ct. 126 (1917).

Petitioner respectfully submits that the Texas statute in clear and unambiguous language taxes the *use* of the article, and since the articles here are clearly by the stipulation of the parties used in the stream of foreign commerce the tax is a direct one imposed upon foreign commerce and therefore unconstitutional.

CONCLUSION

A Writ of Certiorari should be granted to review the decision of the Court of Civil Appeals herein.

Respectfully submitted,

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APPENDIX A

IN THE

Court of Civil Appeals

THIRD SUPREME JUDICIAL DISTRICT OF TEXAS, AT AUSTIN

NO. 11,418

YOUNG & COMPANY OF HOUSTON, *Appellant*

vs.

ROBERT S. CALVERT ET AL, *Appellees*

From The District Court of Travis County, 147th Judicial District, No. 133,230, Honorable Mace B. Thurman, Jr., Judge

This is an appeal from a judgment of the District Court holding that taxes imposed by the Texas Limited Sales, Excise, and Use Tax Statue, Article 20.01, et seq., of Title 122A, Taxation-General, V.C.S., are lawfully collectible on the amounts paid by a contracting stevedore to lease machines and equipment used in loading and unloading deep sea vessels engaged in foreign commerce.

We affirm this judgment.

Appellant Young & Company of Houston are contracting stevedores who, under contracts with owners and operators of ocean-going cargo vessels, load and unload such vessels at the Port of Houston, Harris County, Texas. Manual laborers (longshoremen) physically handle these cargoes on and off the vessels. Appellant furnishes these men tools for loading and unloading such as fork-lift trucks to handle palletized cargoes, grain trimming machines to

trim and stow grain cargoes, heavy-lift machines for cargoes weighing several tons and squeeze machines to handle bales of cotton.

All of these machines and equipment used by appellant in carrying on its business are leased and the lease cost is figured into and is a part of the cost of doing business.

The appellee Comptroller determined that the abovementioned tax was due upon the lease rental paid by appellant to the lessors of the machines and equipment and made a deficiency tax assessment accordingly. The tax plus accrued interest was paid under protest and suit was filed pursuant to statute to recover such amounts as unlawfully assessed and collected after refund was refused.

Appellant is before this Court on a single point of error, being that of the trial court in holding the tax lawful on the machines and equipment the lease cost of which is here taxed were used by the stevedore as a necessary adjunct to carrying on its business, a business which is an integral part of foreign commerce. The sales and use tax here imposed is therefore an impost upon foreign commerce and its imposition is unlawful because (a) an exercise by a State of a power granted exclusively to the Congress of the United States by the Commerce Clause of the Constitution of the United States and (b) an impost or duty on imports and exports also forbidden to the States by the Constitution. Since the Texas Statute recognizes and exempts from taxation subjects which are prohibited to it by the Constitution of the United States, the tax is unlawful under the Texas Statute also.

We overrule this point.

Art. 20.02 imposes "a limited sales tax at the rate of two per cent (2%) on the receipts from the sales at retail of all tangible personal property within this State."

Article 20.01(d) defines "receipts" as meaning "the total amount of the sale or lease or rental prices . . . of the rental sales of retailers. . ."

Article 20.04(a) exempts "the receipts from the sale, lease, or rental of and the storage, use, or other consumption in this State of tangible personal property the gross receipts from the sale, lease or rental of, which, or the storage, use or other consumption of which, this State is prohibited from taxing under the Constitution or laws of the United States or under the Consitution of this State."

51 American Jurisprudence, Taxation, Sec. 206 states the following:

> "The fact that property is used or employed in interstate or foreign commerce does not of itself render it immune or exempt from nondiscriminatory local taxation. This rule includes intangible as well as tangible property. . . . It is held, accordingly, that a state may levy taxes on property used in interstate or foreign commerce, located therein, by whatever name they may be called, that are fixed by reference to the value of the property, if they are not imposed because of such use, and if they amount to no more than would be legitimate as an ordinary tax upon the property, valued with reference to the use in which it is employed."

While generally a State is prohibited from imposing a tax upon the business or privilege of engaging in interstate or foreign commerce, a State excise tax which affects such commerce only incidentally or indirectly may be entirely valid "where it is clear that it is not imposed with the covert purpose or with the effect of defeating rights under the commerce clause. Thus, the fact that a state tax in-

creases the cost of doing business . . . does not necessarily render it an unconstitutional burden on such commerce." 51 Am.Jur. 268-270, Taxation, Sec. 207.

The tax here is not imposed upon appellant's stevedoring operation or its receipts therefrom, but the tax is imposed upon an independent transaction preparatory to such operation. This case is controlled by that line of decisions such as McGoldrick v. Berwind-White Coal Mining Company, United States Supreme Court, 309 U.S. 33 (1940) and, more recently, Canton Company of Baltimore v. Comptroller of Treasury, Supreme Court of Maryland, 231 Md. 294, 190 A.2d 92.

In McGoldrick the Court upheld the New York Sales Tax levied on coal shipped into New York from Pennsylvania and construed the tax as being imposed on a local transaction which the State had a right to tax and not as an undue burden on interstate commerce as such. The Court held that it was not the purpose of the Commerce Clause to relieve those engaged in interstate commerce of their just share of the State tax burdens merely because the incidental or consequential effect of the tax is the increase of the cost of doing the business. That the tax imposed was for State purposes and that the State was not exercising any power which the Constitution has conferred upon the Congress. That it is only when the tax operates to regulate commerce between the States or with foreign nations to an extent which infringes the authority conferred upon Congress that the tax can be said to exceed the constitutional limitations. The Court further held that the tax was equal and that it did not aim at or discriminate against interstate commerce. That it was laid upon every purchaser within the State, of goods of consumption, regardless of whether they have been transported in interstate commerce.

In Canton Company of Baltimore, the Court upheld a State sales tax on the amount paid for leasing, loading and unloading equipment of a stevedoring company whose business was 98 per cent foreign commerce and 2 percent interstate. The facts are similar to the case at bar. Here the Court held that the tax was not imposed directly upon the stevedoring operation. The Court held that the tax was on the continued right to possession of the leased property and was not a tax on the use of the property even though the amount of the tax was measured by the amount of the tonnage handled.

The tax in question here is a transaction tax and not a use tax. See Calvert v. Canteen Co., 371 S.W.2d 556, Supreme Court.

Appellant has cited cases such as Puget Sound Stevedoring Company v. Tax Commission of the State of Washington, 302 U.S. 90, 58 S.Ct. 72 (1937), and Joseph v. Carter & Weeks Stevedoring Co., 330 U.S. 422, 67 Sup.Ct. 815 (1947), in addition to others, which, in our opinion, are not applicable here. Both of these cases involved a general gross receipts tax on the privilege of doing the business of stevedoring.

Appellant is a domestic corporation doing business in Texas. Since it receives the same benefits as any other domestic corporation it must shoulder its share of the tax burdens. The tax in question is applicable to all lessees in Texas leasing equipment such as that used by appellant. The fact that appellant's equipment is used in the furtherance of foreign commerce is not controlling here. The tax is imposed on a local transaction and is levied in a field remaining to the States for purposes of revenue.

The judgment of the trial court is affirmed.

John C. Phillips, Associate Justice

Affirmed
Filed: June 22, 1966.

APPENDIX B

ORDERS OF THE SUPPREME COURT OF TEXAS PRONOUNCED OCTOBER 12, 1966

Orders on Applications

The following Application for Writ of Error is REFUSED:

A-11628: Young & Company of Houston v. Robert S. Calvert, as Comptroller of Public Accounts of the State of Texas; from Travis County.

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YOUNG & COMPANY OF HOUSTON, *Petitioner*

vs.

ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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YOUNG & COMPANY OF HOUSTON, *Petitioner*

vs.

ROBERT S. CALVERT, AS COMPTROLLER OF PUBLIC ACCOUNTS OF THE STATE OF TEXAS, *Respondent*

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Robert S. Calvert, Comptroller of Public Accounts of the State of Texas, as representative of the State of Texas and represented herein by the Attorney General of the State of Texas, opposes the granting of the petition for writ of certiorari because the state appellate courts below have correctly decided the very questions raised by the petition and no substantial federal question is presented.

STATEMENT OF THE CASE

In addition to the brief statement appearing in the petition, the following supplemental statement is made to assist the court in a proper evaluation or review of this case. Petitioner has no permit to do business elsewhere than in Texas, wherein it is chartered. Its business is all transacted within Houston, Harris County,

Texas (S.F. 6-7). It purchases its supplies within Texas and it makes its contracts with its longshoremen and rents all of its materials handling equipment and pallets within Texas from other Texas concerns as intrastate transactions. It also transacts various other business within that state. (S.F. 24). All of the stevedoring services were carried on in the City of Houston, Texas; and before any stevedoring services were contracted or performed, Petitioner rented or leased the matrials handling equipment from local concerns as separate local transactions. (S.F. 11-12). The property is maintained and utilized in Houston and never leaves there. (S.F. 17). It is the cargo itself which is subsequently loaded by the use of the equipment which constitutes the foreign commerce destined for foreign ports. (S.F. 20).

NO SUBSTANTIAL FEDERAL QUESTION PRESENTED

The issue raised by Petitioner is simply whether the Texas Limited Sales, Excise, and Use Tax, a transactions tax, may constitutionally be levied upon a local taxable event, the lease made and the rentals paid thereby, by a domestic stevedoring company to certain Texas concerns in order to lease machines and equipment for subsequent use in the stevedoring company's loading or unloading operations of vessels engaged in foreign commerce. Petitioner contends that because the business of loading or unloading vessels by stevedore companies engaged in foreign commerce has been declared to be foreign commerce, a state is not at liberty to tax any economic transaction entered into by the stevedoring company preparatory and necessary to its subsequent services at the dock of loading or unloading; that is, a sale or lease of equipment or supplies

needed for use in merely loading or unloading such commerce.

The materials handling equipment and pallets which are the subject of sale or lease remain at all times in Texas and is neither an "import" nor "export." It is not commerce; it is merely useful and necessary in engaging in interstate or foreign commerce. Petitioner's contention, however, is that because it is essential to the performance of its stevedoring operations, they thereby become an integral and inseparable part of the foreign commerce, rendering their sale or lease immune from non-discriminatory state taxation.

It is apparent from Petitioner's brief that no court decision has ever been handed down in support of such a contention. In fact, all of the cases appear to hold uniformly that the showing of necessary use or employment of property in interstate or foreign commerce will not of itself render it immune or exempt from nondiscriminatory state taxation. 51 Am Juris 267, Taxation, Sect. 206; *Eastern Air Transport, Inc. v. South Carolina Tax Commission,* 285 U.S. 147, 152-153 (1932).

PETITIONER'S CASES DISTINGUISHED

The six cited cases in Petitioner's application do not support its contention in this respect and are all readily distinguishable from the case at bar. Both the cases of *Joseph v. Carter & Weekes Stevedoring Co.,* 330 U.S. 422 (1947), and *Puget Sound Stevedoring Co. v. Tax Commission of the State of Washington,* 302 U.S. 90 (1937), involved occupation taxes based on gross receipts of the stevedoring businesses imposed directly on the privilege of doing such business. This Court merely held in these two cases that a state was

not at liberty to tax the privilege of doing interstate or foreign commerce (interstate or foreign commerce business of loading and unloading) by exacting in return therefore a percentage of the gross receipts. The tax involved in the case at bar is a sales tax upon a local, independent, separable economic activity and transaction, removed from the flow of foreign commerce and merely preparatory to subsequent loading and unloading operations yet to be performed. The tax is on the sale or lease made, which was the taxable event and a completed transaction before the export process began, and not on the use that the materials handling equipment and pallets were thereafter put to foreign commerce. The character of the tax is held to be upon certain general but specified transactions engaged in by everyone, *Calvert v. Canteen Co.*, 371 SW 2d 556 (Tex. Sup.Ct. 1963); it was not a tax upon the right or privilege of engaging in a business, as were the gross receipt taxes which this Court found was an unreasonable burden on interstate commerce. In the case at bar, no burden whatever on such commerce is shown or demonstrated—much less an unreasonable burden! These cited cases had nothing to do concerning the Export-Import Clause contention of Petitioner but involved only the Commerce Clause. They did not even hold that a state occupation tax could not be validly imposed on stevedoring itself. The *Puget Sound Stevedoring Company* case, supra, specifically held in part that the stevedoring business of supplying longshoremen, without directing or controlling their work of loading or unloading, ". . . is not interstate or foreign commerce, but rather a local business and subject . . . to taxation by the state." The Court likened this ". . . to that of a labor or employment bureau." 58 S.Ct. 74. Surely the sale or rental of equipment, cranes, and

pallets in the case at bar are as much outside the flow of commerce as the labor or employment bureau mentioned by the Supreme Court!

The cases of *Richfield Oil Corp. v. State Board of Equalization*, 329 U.S. 69 (1946) and *Empresa Siderurgica v. County of Merced, California*, 337 U.S. 153 (1949), are not analogous and are clearly distinguishable. These holdings relate to a tax directly on the export commodity itself or on the export process itself. In the *Richfield* case, supra, the State of California sought to levy a tax on the sales of oil sold by the taxpayer to the New Zealand government. The taxable event as assessed was the transfer of the oil by pumps from a harbor storage tank into tankers bound for New Zealand. The taxable event in the case at bar, however, was the lease of the dock equipment. Thus, if the Supreme Court in the *Richfield* case, supra, had held that a sales tax on the pumps was a violation of the Export-Import Clause, then it would be good authority for Petitioner's claim.

The same consideration applies to the case of *Empersa Siderurgica v. County of Merced, California*, supra. There a Columbian corporation had purchased a cement plant in California for the purpose of disassembling and transporting it to a point out of the United States. Before it was disassembled, however, the county assessed a property tax. The Court held that there was no violation of the Export-Import Clause and as in *Richfield*, that an article of commerce is not an export *until* actually shipped to a foreign port. Thus, as applied to Petitioner's equipment and cranes, they would be taxable since they were *never* bound for a foreign point. The "holding" in this case (cited on page 9 of Petitioner's petition) is only rank

dicta. In any event, the taxation of the use of the cranes and equipment does not tax the process of exportation. No doubt the quotation refers to a general occupation tax in referring to the process that may not be taxed. True, the cranes are a means by which exportation is facilitated. But the *indirect* taxation of the means is a far different matter from the *direct* taxation of the process itself.

A. G. Spalding & Bros. v. Edwards, 262 U.S. 66 (1923) is also of no help to Petitioner. In that case, a foreign corporation, desiring to purchase a large shipment of baseballs and baseball bats, authorized a New York brokerage firm to secure them. The brokerage firm instructed the Spalding Co. to deliver them up for shipment. The Supreme Court accordingly held the goods nontaxable. The obvious distinction between the *Spalding* case and the one at bar is that the merchandise there was actually being exported, while the cranes and equipment in this case are not. Indeed, New York sought to tax a step in the process of exportation—the delivery of goods to the consignee. On the other hand, Texas seeks to tax the lease rentals paid for the equipment, which is clearly outside of the exportation process.

Least in point is *Crew Levick Co. v. Commonwealth of Pennsylvania,* 245 U.S. 292 (1917). In that case, the Supreme Court struck down a general merchandising tax based on sales. The statute there was extremely broad, unlike the Texas statute which is narrow and specific. Accordingly, the Court said at page 297: "[The statute] operates to levy a direct burden upon every transaction in commerce by withholding for the use of the state, a part of every dollar received on such transaction." This likewise points out the dis-

tinction between the taxation of the means of exportation and the taxation of the actual process itself. A tax as broad as the Pennsylvania tax is clearly the taxation of the process, since the receipts are derived in part from stevedoring income and the tax thereon fluctuated according to the volume of commerce. But the taxation of the dock crane and equipment presents a different question, for the tax here would still be due if the materials handling equipment were never used to load the ship. The tax becomes due when the lease arrangement is made, not when the ships are subsequently loaded or unloaded.

RESPONDENT'S AUTHORITIES SUPPORT HIS POSITION

The Texas Sales Tax is not unconstitutional, being "a general tax, laid on all property, alike, and not levied on goods in course of exportation, nor because of their intended exportation. . . ." *Turpin v. Burgess,* 117 U.S. 504, 507 (1886). It is nondiscriminatory and less onerous than the New York Sales Tax, upheld by this Court, which declared: "Equality is its theme. . . ." *McGoldrick v. Berwind-White Coal Mining Co.,* 309 U.S. 33, 42, et seq. (1940). In the latter case, the sales tax was upheld on local purchases or transactions despite the fact that the property had just traveled in interstate commerce. This Court has likewise held that such a tax may be levied upon an intrastate transaction although the property sold or delivered is to be forthwith shipped out of the state. *Dept. of Treasury of State of Indiana v. Wood Preserving Corp.,* 313 U.S. 62, 68 (1941).

This Court long ago upheld a state tax on the sale of fuel to airplanes engaged in interstate commerce, it being immaterial that the property was necessary

to be used in such commerce by the interstate carrier. This Court correctly reasoned that the tax was upon the transaction and the general mass of property within the state, as distinguished from the aspect of the carrier's subsequent use of the property. *Eastern Air Transport, Inc. v. South Carolina Tax Comm.*, supra, 285 U.S. 147, 152.

In addition, this Court has made it clear that a state is at liberty to tax the "use" to which the fuel is put in withdrawing it from storage within the state and placing it in the tanks of planes, although it be conceded that its ultimate purpose or function is to generate motive power for carrying on interstate commerce . . . "[so long as the tax] falls short of a tax directly imposed on its use in interstate commerce." *Edelman v. Boeing Air Transport*, 289 U.S. 249, 252 (1933).

Since it is clear that the Texas Limited Sales, Excise, and Use Tax is imposed on the lease price of the equipment and pallets (and not directly on their use in interstate or foreign commerce), Petitioner's contention must of necessity be dismissed as falling short of raising a substantial federal question. The tax involved is not on the privilege of engaging in business and is clearly outside the actual process of exportation. *Shell Oil Co. v. State Board of Equalization*, 414 P2d 820 (Cal. Sup. Ct. 1966), appeal to the U.S. Sup. Ct. filed Dec. 14, 1966, Docket No. 863.

In *Shell Oil Co.*, supra, the California Sales Tax, like the Texas tax here involved, assessed a tax on the sale of bunker fuel oil to vessels engaged in interstate and foreign commerce. Shell made exactly the same argument as Petitioner, but the Court rejected it and upheld the tax on the property as neither a discrimina-

tion against nor an unreasonable burden upon interstate commerce. Declaring the tax to be levied upon a subject related to but nevertheless severable from articles of export, and the transaction not to be a part of the "process of exportation," the Court held that this process under the import-export clause ". . . begins when the goods are committed to the common carrier for transportation out of the state to the state of their destination, or have started on their ultimate passage to that state." 414 P2d 824.

The holding is clearly applicable to the Texas tax on the lease transaction of the materials handling equipment. Petitioner's argument, like Shell's contention, that the tax in effect was upon an instrumentality, service, product, or process of interstate or foreign commerce because absolutely essential and necessary to the carrying on of such commerce was rejected as meritless as follows:

> "The acceptance of such a contention would lead back to every forest, mine, and factory in the land and create a zone of tax immunity never before imagined! (Canton R. Co. v. Rogan, supra, 340 U.S. 511, 515). Such a broad and all-embrasive interpretation of the export clause has never been accepted. (See e.g., Canton R. Co. v. Rogan, supra, 340 U.S. 511, 71 S. Ct. 447; Empresa Siderurgica v. City of Merced, supra, 337 U.S. 154, 69 S. Ct. 995; Joy Oil Co. v. State Tax Commission (1949) 337 U.S. 286, 69 S.Ct. 1075, 93 L.Ed. 1366; Peck & Co. v. Lowe (1918) 247 U.S. 165, 38 S.Ct. 432, 62 L.Ed. 1049; Cornell v. Coyne (1904) 192 U.S. 418, 24 S.Ct. 383, 48 L.Ed. 504; Pittsburgh & S. Coal Co. v. Bates (1895) 156 U.S. 577, 15 S.Ct. 415, 39 L.Ed 538; Coe v. Town of Errol, supra, 116 U.S. 517, 6 S.Ct. 475.) In the *Canton* case a tax measured in large part by the gross receipts

of a common carrier of export freight in the port city of Baltimore was upheld against import-export clause challenges. So, too, the court sustained a tax on operations involving freightage of export goods to the port. (Western Maryland R. Co. v. Rogan, (1951) 340 U.S. 520, 71 S.Ct. 450, 95 L.Ed. 501.)" 414 P2d 825.

Finally, the cases are uniform in upholding the constitutionality of a sales tax in its incidence upon the transaction of a sale or lease of cranes and other materials handling equipment intended to be used for loading or unloading vessels or other interstate or foreign carriers. *Canton Co. of Baltimore v. Comptroller of Treasury,* 231 Md 294, 190 A2d 92 (1963); *Mohegan International Corp. v. City of New York,* 9 N.Y.2d 64, 172 N.E.2d 546 (1961); *Commonwealth of Pennsylvania Board of Finance and Revenue v. Northern Metal Co.,* 204 A2d 467 (1964), cert.den. 85 S.Ct. 1026.

CONCLUSION

Respondent asks that the petition for writ of certiorari be denied, because the question raised in the petition was correctly decided by the Supreme Court of Texas, in unqualified approval of the Opinion of the Austin Court of Civil Appeals, and clearly no substantial federal question is presented in this Court.

Respectfully submitted,

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PROOF OF SERVICE

I, Kerns B. Taylor, attorney for Respondent herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on the 1st day of February 1967, I served two copies of the foregoing Brief In Opposition to Petition For Writ of Certiorari on Robert Eikel, Attorney for Petitioner, by mailing such copies in a duly addressed envelope, with first air mail postage prepaid, at the address of 205 Oil & Gas Building, Houston, Texas 77002.

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